

The State of South Carolina



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June 30, 1993

The Honorable J. Samuel Griswold, Ph.D.
Interim Commissioner
South Carolina Department of Social Services
P. O. Box 1520
Columbia, South Carolina 29202-1520

Dear Dr. Griswold:

In a letter to this Office you requested an opinion on several aspects of recently enacted H.3669. The responses set forth hereafter are first impressions by this Office as to how the legislation might be interpreted. Legislative clarification or review by a court could be sought which would detail more precisely how the questions addressed here may be handled. Such clarification or review is in fact preferable where significant ambiguities are present.

Question 1

You first questioned the impact of this legislation on foster care placements and foster homes already in existence on July 1, 1993. Pursuant to the provision to be codified as S.C. Code Section 20-7-1642

No child may be placed in foster care with a person:

- (1) with a substantiated history of child abuse or neglect;
or
- (2) who has pled guilty or nolo contendere to or who has been convicted of:
 - (a) an 'Offense Against the Person' as provided for in Chapter 3, Title 16;

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- (b) an 'Offense Against Morality or Decency' as provided for in Chapter 15, Title 16; or
- (c) contributing to the delinquency of a minor as provided for in Section 16-17-490.

The legislation becomes effective July 1, 1993.

You specifically asked:

- a. Must children be removed immediately from homes in which a foster parent has an excluded conviction or a case of child abuse/neglect? Or does the bill only apply to children being introduced into a foster home for the first time after July 1, 1993?
- b. If the bill only applies to placements occurring for the first time after July 1, 1993, what would be the bill's impact on the agency's ability to use or relicense existing homes after July 1, 1993 when one of the conditions precluding placement occurred prior to July 1, 1993?

Based upon conversations with individuals familiar with the history of the legislation, I have been informed that it was intended that the legislation have a retroactive effect without any "grandfathering" considerations. Therefore, it was intended that the bill apply to foster children in existing homes.

In interpreting a statute, the primary purpose is to ascertain the intent of the legislature. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987); Multi-Cinema, Ltd. v. S.C. Tax Commission, 292 S.C. 411, 357 S.E.2d (1987). When interpreting a statute, the legislative intent must prevail if it can be reasonably discovered in the language used, which must be construed in light of the intended purpose. Gambrell v. Travelers Insurance Co., 280 S.C. 69, 310 S.E.2d 814 (1983).

Generally, statutes should be construed prospectively rather than retroactively unless there is legislative intent for retroactive application. See: Opins. of the Atty. Gen. dated August 1, 1989, July 13, 1989, June 17, 1987; cases collected at 24 West's South Carolina Digest, 2d, Statutes, Key nos. 261-267. Here, in light of the intention that the legislation be construed as being applicable to children in existing foster homes, it appears that the prohibitions of such legislation should be read as being applicable to foster care placements and foster homes already in existence as of July 1, 1993. Such construction

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would also be consistent with the concept of continuing review of children placed in foster care and the rule that as to child custody cases, further disposition may be made as the result of changed circumstances. See: S.C. Code Section 20-7-2376; DSS Regulation 114-550; Children's Foster Care Review Board Regulations 24-3 *et seq.*; *Ex parte Atkinson*, 238 S.C. 521, 121 S.E.2d 4 (1961); *Boykin v. Boykin*, 296 S.C. 100, 370 S.E.2d 884 (Ct. App. 1988). Also such construction would be consistent with the determination of the State Supreme Court in *State v. Cagle*, 111 S.C. 548, 96 S.E. 291 (1918) that statutes regarding children are entitled to "favorable and liberal construction." Placement in foster care, therefore, would appear to be an ongoing reviewable process subject to legislative changes such as those expressed in H.3669. In light of the prohibition set forth in the legislation to the placement of children in foster care with prohibited individuals, it does not appear that children may continue to reside in these prohibited situations as of July 1, 1993. However, consistent with the response set forth below to your second question, any change regarding such children does not appear to be "automatic".

Question 2

You next questioned the impact of H.3669 on court-ordered placements into homes with disqualifying conditions. You specifically asked:

If the court order predates July 1, 1993, does the bill automatically reverse it?

If a court issues an order after July 1, 1993 requiring placement in an excluded home, what would be the order's legal effect?

While it is stated in the response to the preceding question that H.3669 could be construed as being applicable to foster care placements and foster homes already in existence as of July 1, 1993, I would caution against any automatic reversal of a court order. It has been stated that "(t)here is a marked conflict concerning whether the effect of a court decision on the rights of the parties to that particular litigation can be changed by subsequent retroactive legislation." 2 Sutherland Statutory Construction, Vol. 2, Section 41.08, p. 391.

As noted previously, continuing review of children placed in foster care is provided. DSS Regulation 114-550 (N) (1) states: "(f)oster family licenses shall be renewed on an annual basis." Also, pursuant to such regulation, a foster family license may be revoked in the manner provided. Moreover, pursuant to DSS Regulation 114-550 (O)

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(1) Foster parents who have or have had a substantiated case of child abuse and or neglect, or who have been convicted of a crime of moral turpitude and/or who have a criminal record must submit written documentation regarding the type of rehabilitation program they might have undergone and the effects of the rehabilitative efforts on their behavior/lives. An evaluation by the involved counsel or therapist must also be submitted to the Agency.

(2) The Commissioner, or his designated representative(s), will review this data and determine if a license can be issued.

(3) If a licensed foster parent(s) has been or is convicted of criminal activity, the family's license shall be revoked in accordance with N (3).

Therefore, by regulation, a procedure has been established regarding the licensing or continued licensing of foster parents who have or have had a "substantiated case of child abuse or neglect" or who have specified criminal convictions. Other DSS regulations further mandate the manner of revocation of licenses and the procedures for removal of children from foster homes. See: DSS Regulation 114-110.

Consistent with such it appears that as to any court orders regarding placements which predate July 1, 1993, further review by a court in light of the statutory change would be in order. Moreover, as to any court order after such date inconsistent with the legislation, an appeal could be considered.

Question 3

In your third question you asked whether DSS is to consider all individuals in a foster home or just the foster parent(s). Again, the provision states

No child may be placed in foster care with a ... (prohibited) ...
person

In the opinion of this Office, consideration should be given to all individuals residing in the foster home and not just those who are licensed.

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Construing the provision to apply to all individuals residing in the foster home would be consistent with DSS Regulation 114-550 (A) (3) which defines the "assessment summary" which is reviewed in the licensing procedure as the "self-study (autobiography) completed by the foster parent(s) about themselves and all family members living in the home." (emphasis added) See also: DSS Regulation 114-550 (E) (3) ("A minimum of one interview shall be conducted in the home of the applicant with the prospective foster mother, foster father, their children and other household members") DSS Regulation 114-550 (I) (f) ("All members of the household shall be interviewed in order to evaluate their willingness to accept such a child.") (emphasis added)

Question 4

You next questioned what is meant by the phrase used in H.3669 "a substantiated history of child abuse or neglect"? You particularly questioned whether in circumstances where conditions in existence prior to July 1, 1993 preclude placement, does DSS consider indicated cases of abuse or neglect of which individual caseworkers have knowledge but which have been purged from DSS records pursuant to the seven year limitation set forth in S.C. Code Sections 20-7-650 and 20-7-680.¹

Pending clarification by the General Assembly of the term "a substantiated history of child abuse or neglect" reference may be made to the provisions of Section 20-7-650 which provide for "affirmative determinations" of child abuse or neglect and which provide for the establishment of a Central Registry of Child Abuse and Neglect. Upon

¹Section 20-7-650 (G) states in part

The names, addresses, birth dates, identifying characteristics, and other information unnecessary for auditing and statistical purposes of persons named in affirmative determinations of child abuse or neglect maintained in agency files must be destroyed seven years from the date services are terminated.

Section 20-7-680 (F) states

The names, addresses, birth dates, identifying characteristics, and other information unnecessary for auditing and statistical purposes of persons named in affirmative determinations of child abuse or neglect must be destroyed seven years from the date services are terminated.

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an "affirmative determination", names of individuals must be placed upon the Central Registry. Individuals placed upon such Central Registry would appear to have "a substantiated history of child abuse or neglect" for purposes of H.3669.

As noted, pursuant to Sections 20-7-650 and 20-7-680, records of persons named in "affirmative determinations" of child abuse or neglect must be purged after seven years. Pending further clarification by the General Assembly it is questionable whether cases of which caseworkers have knowledge but which have been mandatorily purged due to the seven year limitation period could be cited. Admittedly, however, pending such legislative clarification, particular situations may merit consideration even in light of the referenced seven year limitation, especially in particularly egregious instances of child abuse or neglect. Of course, if a separate criminal conviction was obtained, presumably such could continue to be noted and would probably disqualify the individual as having "a substantiated history of child abuse or neglect."

Question 5

You also questioned whether an out-of-state history of abuse or neglect or a criminal record from another state which is known by DSS is to be considered within the prohibition of "a substantiated history of child abuse or neglect." While the statute makes no specific reference to in-state or out-of-state histories or convictions, it would appear absurd to ignore a known out-of-state history or conviction. Generally, it is recognized that a statute must receive a practical, reasonable and fair interpretation consonant with the purpose, design and policy of the lawmakers. Caughman v. Columbia Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948). Moreover, courts will reject any construction that will lead to an absurd result that would defeat the plain legislative intention. State ex rel. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964); 2A Sutherland Statutory Construction, § 45.12 (4th Ed.). Therefore, pending clarification by the General Assembly, it appears that known abuse or neglect determinations, such as those established pursuant to Section 20-7-650, or criminal records which come within the prohibition could be considered even if such involve out-of-state determinations or convictions.

Question 6

In your next question you asked whether H.3669 in regulating the placement in "foster care" applies only to foster family home care or does it also apply to child caring facilities.

Pursuant to S.C. Code Section 20-7-30 the term "child caring facility" is defined as

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... a campus with one or more staffed residences and with a total population of twenty or more children who are in care apart from their parents, relatives or guardians on a continuing full-time basis for protection and guidance.

S.C. Code Section 20-7-2380 defines "foster care" to "... include foster family, institutional, and group home care." I would note that pursuant to S.C. Code Section 20-7-2376 a local foster care review board is mandated to review designated aspects of the functions of a child caring facility. See also: Children's Foster Care Review Board Regulation 24-19 ("Foster care includes family foster home, child-caring facility, and residential group home") Referencing such comprehensive definitions of "foster care" it appears that pending further clarification by the General Assembly such term as used in H.3669 could be construed as including foster family home care, child caring facilities and residential group homes.

Question 7

In your next question you referenced

When DSS places a child for adoption, it signs placement agreements with the family but DSS retains custody until the filing of the adoption petition divests the agency of custody pursuant to S.C. Code Ann. §20-7-1738 (Supp. 1992). Does this bill apply to adoptive placements (a) between the time placement agreements are signed and the petition is filed and (b) between the time the petition is filed and the court issues the adoption decree?

I was informed that when a child is placed adoptively and an adoption placement agreement is signed, case management is transferred from the foster care division to the Division of Adoption Services. Once an adoption placement agreement is signed the child is no longer eligible for foster care payments but may receive adoption assistance or subsidy payments if the child is eligible due to special needs.

S.C. Code Section 20-7-1738 states in part:

Once a petitioner ... (to adopt) ... has received the adoptee into his home and a petition for adoption has been filed, the petitioner has temporary custody of the adoptee

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Therefore, as to a child in foster care who is being adopted, custody of DSS is statutorily divested by the filing of the petition. Moreover, pursuant to that same provision, as to any subsequent action regarding possible removal of the child from the adoptive parents, the burden of proof shifts to the child-placing agency to prove that continued placement with the adoptive family is not in the best interest of the adoptee. Therefore, while a case may be considered transferred for purpose of case management and payment eligibility and no longer be considered a foster care case for administrative purposes when an adoption placement agreement is signed, pursuant to Section 20-7-1738, custody is transferred to the adoptive parent only when the petition is filed. As a result and pending further statutory clarification, it appears that H.3669 would appear to apply to adoptive placements between the time placement agreements are signed and the petition is filed.

As to the question regarding whether H.3669 applies between the time the petition is filed and the court issues the adoption decree, it appears that pursuant to Section 20-7-1738, the referenced legislation would probably not apply. Such statute acts to divest DSS of custody of the adoptee transferring such to the petitioner to the adoption.

Question 8

In your last question you asked whether H.3669 applies only to those crimes specifically established by statute in Title 16, Chapters 3 and 15 or does it encompass other statutory offenses or common law offenses which also could be characterized as offenses against the person or against morality and decency.

Again, Section 20-7-1642 prohibits placement with an individual who has been convicted of "an 'Offense Against the Person' as provided for in Chapter 3, Title 16 ... (or) ... an 'Offense Against Morality or Decency' as provided for in Chapter 15, Title 16." The general rule in statutory construction is that words used must be given their plain and ordinary meaning without forced construction to expand the statute's operation. Hitachi Data Systems Corp. v. Leatherman, _____ S.C. _____, 420 S.E.2d 843 (1992). Moreover, it is a rule of construction that "... the enumeration of particular things excludes the idea of something else not mentioned." Pennsylvania National Mutual Casualty Insurance v. Parker, 282 S.C. 546, 320 S.E.2d 458, 463 (Ct. App. 1984). Here the statute specifies the prohibited offenses and, therefore, pending further legislative clarification or amendment, it does not appear that other statutory or common law offenses not included in Title 16 Chapters 3 and 15 would be included.

CONCLUSION

1. H.3669 should be read as being applicable to foster care placements and foster homes already in existence as of July 1, 1993. However, as set forth below, any change regarding such children does not appear to be "automatic."
2. As to any court orders regarding placements which predate July 1, 1993, further review by a court in light of H.3669 would be in order. As to any court order after such date inconsistent with the legislation, an appeal could be considered.
3. In construing placements prohibited by H.3669, consideration should be given to all individuals residing in the foster home and not just those who are licensed.
4. In construing the term "a substantiated history of child abuse or neglect" reference may be made to the provisions of Section 20-7-650 which provide for "affirmative determinations" of child abuse or neglect and which provide for the establishment of a Central Registry of Child Abuse and Neglect. If a separate criminal conviction was obtained, such could be noted and would probably disqualify the individual as having "a substantiated history of child abuse or neglect."
5. Known out-of-state abuse or neglect determinations or criminal records could be considered as coming within the prohibition of a "substantiated history of child abuse or neglect."
6. The term "foster care" as used in H. 3669 could be construed as including foster family home care, child caring facilities and residential group homes.
7. H.3669 would apply to adoptive placements between the time placement agreements are signed and a petition for adoption is filed. The legislation would be inapplicable between the time the petition is filed and the court issues the adoption decree.
8. Other statutory or common law offenses not included in Chapters 3 and 15 of Title 16 which could be characterized as offenses against the person or against morality and decency would not be considered for purposes of H. 3669.

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With kind regards, I am

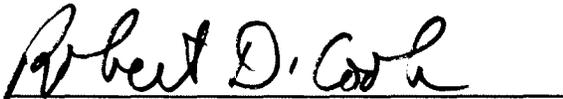
Very truly yours,



Charles H. Richardson
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